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NEUTRALIZATION AND EQUAL TERMS

Neutralization is the imposition by international agreement of a condition of permanent neutrality upon lands and waterways.

The author of the essay ¹ of which the foregoing is the opening sentence draws the following distinction between the neutrality and the neutralization of states (p. 1):

While simple neutrality is the condition of those states which in time of war take no part in the contest, but continue pacific intercourse with the belligerents, neutralization perpetuates this condition by means of treaties effected between several powerful nations and the neutralized state.

Dr. T. J. Lawrence makes the same distinction as follows:

In ordinary neutrality are involved the two elements of abstention from taking part in an existing war and freedom to engage in it or not at pleasure. In neutralization the first element remains the same; but, instead of the second, there is imposed by international law either an obligation not to fight except in the strictest self-defense or an obligation to abstain from warlike use of certain places and things which have had the neutral character stamped upon them by convention.²

So Rivier in his *Principes du Droit des Gens*, I, 162, cited in Moore's *International Law Digest*, III, 4:

Territories or portions of territory belonging to a state other than those to which a permanent and conventional neutrality is assured, may, by an international act or in an international interest, be sheltered from acts of war. Such are said to be neutralized. This neutrality bears only on the territory, on the soil, and exercises no direct influence on the generality of rights of the sovereign territorial state, nor on the population.

¹ *Neutralization*, by Cyrus French Wicker, M. A., LL.B., B. C. L., Oxon. Henry Frowde, Oxford University Press, London, New York and Toronto, 1911.

² *A Handbook on Public International Law*, by Dr. T. J. Lawrence, Part IV, p. 140.

The contractual and international nature of neutralization is stated by Mr. Wicker as follows (p. 1):

The international relationship thus arising between a neutralized state and its guarantors is a purely contractual one. It exists neither by rules of international law nor in the agreed customs of nations, but solely in the treaties by which it is created, their purpose being to effect a relationship which shall exist permanently between all the parties concerned, requiring from the neutralized state a continuous observance of peace toward all the world and from the guarantors the recognition of that state in integrity, independence, and perpetual peace.

Referring to this international guaranty as an essential of true "neutralization," and to a frequent but inaccurate use of the term, Dr. Lawrence says:

As neutralization alters the rights and obligations of all the States affected by it, either their express consent, or the agreement of the Great Powers acting as in some sort their representatives, is necessary in order to give it validity. The word is often used in a loose and inaccurate manner to cover undertakings in abatement or mitigation of war, entered into by one or two States. We must, therefore, remember that there can be no true neutralization without the complete and permanent imposition of the neutral character by general consent. Thus Argentina and Chile could not impose an obligation on the rest of the world to refrain from warfare in the Straits of Magellan by declaring them neutralized, as they did by treaty between themselves in 1881.³

The same author, assuming that the United States would keep the Hay-Pauncefote treaty in its letter and spirit, observed (*ante motam litem*):

But an agreement between the States most directly interested may in practice amount to much the same thing, if they are powerful and determined, and covenant for the application of rules which have already received general consent in a similar case. The Treaty of 1901 between Great Britain and the United States for applying to the Panama Canal, when made, the rules of navigation now applied to the Suez Canal, is an illustration.⁴

³ *A Handbook on Public International Law*, by Dr. T. J. Lawrence, p. 141.

⁴ *Ibid.* For an instructive discussion of Neutrality and Neutralization, see Chapter XIV of Dr. Holland's *Studies in International Law*, entitled "The International Position of the Suez Canal."

Referring to the Hay-Pauncefote treaty, Mr. Wicker says (p. 80):

This treaty with England, which, however, does not amount to complete neutralization, since it is an agreement between two nations only, further provides that the Canal is to be safeguarded and maintained in neutrality by the United States alone, and consequently is a compromise between neutralization and complete American control.

In his *Manuel de Droit International Public*, 273, M. Bonfils says that the Suez Canal is not neutralized, because it is not closed to the ships of war of belligerents, but Professor Moore, who cites the passage in his *Digest of International Law*, III, 267, remarks that "the term 'neutralization' has come to be used in a sense less strict than that indicated by the author."

While Great Britain and the nations who may signify their adherence to the rules which the United States has adopted in Article III of the Hay-Pauncefote treaty for the neutralization of the canal, might not be bound in case of need to maintain the neutrality of the canal, would they not surely so do if requested by the United States? Would not their adhesion to the "rules" and the use of the canal thereunder be a virtual guaranty of its neutralization even if the United States alone could not maintain its neutrality? And would not this neutralization be in the interest of the commerce and peace of the world?

The object of the Hay-Pauncefote treaty, as declared in the preamble by both the high contracting parties, is

To facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans by whatever route may be considered expedient and to that end to remove any objection which may arise out of the convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, *without impairing the "general principle" of neutralization established in Article VIII of that convention.*

The rules that "the United States adopts" are agreed to by Great Britain as a party to the treaty, and the second rule ordains that—

The Canal shall never be blockaded nor shall any right of war be exercised nor any act of hostility be committed within it.

Would not Great Britain be morally bound by this agreement to uphold that immunity from war, if occasion required? So with the other

rules. Nor is it to be forgotten that Panama has become a party to the Hay-Pauncefote treaty by its express incorporation into the treaty of November 18, 1903, between the Panaman Republic and the United States.

Instead of being guaranteed by "several powerful nations," the only guarantor of the neutrality of the Isthmus of Panama under the treaty of 1846 between the United States and New Granada (now Colombia) was the United States itself. The guaranty, with its purpose and consideration, was couched in the following terms (Article 35):

And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages, and for the favors they have acquired by the 4th, 5th, and 6th articles of this treaty, the United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory.⁵

The way in which the treaty of 1846 between the United States and New Granada combined the guaranty of Colombia's rights of sovereignty and property in the isthmus with the guaranty of the neutrality of that part of her territory is very suggestive in view of the course pursued by the United States in connection with the so-called "revolution" in Panama during Mr. Roosevelt's administration, in which Colombia was deprived of both her sovereignty and property in the isthmus.

The guaranty of 1846 put our sister republic in a somewhat anomalous condition. New Granada did not agree to remain neutral in any war that might arise in Latin-America, or elsewhere, or to refrain from waging aggressive warfare herself. Of course, she retained the right of self-defense, but she would doubtless have looked to the United States under the treaty of 1846 for protection and intervention in case of trouble with a foreign Power. Does the Panaman Republic, as the successor of Colombia on the isthmus, succeed to this guaranty of neutrality? Or is the Canal Zone, in this respect, to be distinguished from all the remain-

⁵ Malloy's *Treaties and Conventions*, Vol. I, p. 312.

ing territory of the Panaman Republic? Nothing is said on this subject in our treaty of November 18, 1903, with Panama, whose independence, however, is guaranteed by the United States, in that treaty, while the Canal Zone, of which the United States has thereby acquired "perpetual control," or rather, the canal itself, and its entrances, are neutralized by Article XVIII in the following unequivocal terms:

The canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section 1 of Article III of and in conformity with all the stipulations of the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.⁶

But in the proposed treaty with Colombia, which was signed on January 22, 1903, by Mr. John Hay and Mr. Thomas Herran, and shortly afterwards ratified by the Senate of the United States but subsequently rejected by the Colombian Congress, it was provided, in Article III, that

all the stipulations contained in Article 35 of the treaty of 1846-48 between the contracting parties shall continue and apply in full force to the cities of Panama and Colon and to the accessory community lands and other property within the said zone, and the territory therein shall be neutral territory and the United States shall continue to guarantee the neutrality thereof and the sovereignty of Colombia thereover, in conformity with the above mentioned Article 35 of said treaty.⁷

It was the isthmus and not merely the Canal Zone that was neutralized by the treaty of 1846 between the United States and New Granada.

Speaking in the Senate, on a bill making an appropriation for the transportation of the United States mails by railroad across the Isthmus of Panama, Mr. Webster said:

The basis of the whole, Sir, is our treaty with New Granada, which was ratified by this body and proclaimed in June, 1848. Looking to the security of a mode of communication across the continent at this Isthmus, this government took great pains to obtain the right from the government of New Granada, and by the treaty it is stipulated that whatsoever communication should be made across the Isthmus should be open to the

⁶ Malloy's *Treaties and Conventions*, Vol. II, pp. 1354-1355.

⁷ Senate Ex. K, 57th Congress, 2d Session, January 24, 1903 (injunction of secrecy removed), p. 5.

government of the United States and citizens of the United States upon as good terms as to the citizens of New Granada itself.

This government looking upon this stipulation as a benefit obtained, a boon conceded by the government of New Granada, as an equivalent for this consideration, entered, on its part, into an engagement to protect and guarantee and defend the neutrality of *this whole Isthmus*. This will be seen by reference to the thirty-fifth article of the treaty, which will be found in the volume of the laws of the last session. It is there very distinctly stated. There is no question about it. We are under treaty obligations *to maintain the neutrality of this isthmus and the authority of the government of New Granada over it*. (V, *Webster's works*, 317.)

So lately as 1903, two years subsequent to the Hay-Pauncefote treaty, the United States showed its willingness to co-operate with Colombia in the administration of the canal by the following provision in the same article of the proposed treaty:

In furtherance of this last provision [Article III *supra*] there shall be created a joint commission by the Governments of Colombia and the United States that shall establish and enforce sanitary and police regulations.⁸

In view of the recent contention that the Hay-Pauncefote treaty has been made void or voidable by the alleged change in the sovereignty of the zone, under the treaty of November 18, 1903, between the United States and Panama, giving the former "perpetual control" and making it (as contended) "sovereign of the territory," it is interesting to read Article IV of the proposed treaty of January 22, 1903, with Colombia (ratified as it was by the United States Senate but rejected by the Colombian Congress):

The rights and privileges granted to the United States by the terms of this convention shall not affect the sovereignty of the Republic of Colombia over the territory within whose boundaries such rights and privileges are to be exercised.

The United States freely acknowledges and recognizes this sovereignty and disavows any intention to impair it in any way whatever or to increase its territory at the expense of Colombia or of any of the sister republics in Central or South America, but on the contrary, it desires to strengthen the power of the republics on this continent, and to promote, develop and maintain their prosperity and independence.⁹

⁸ Senate Ex. K, 57th Congress, 2d Session, January 24, 1903 (injunction of secrecy removed), p. 6.

⁹ *Ibid.*, p. 6.

Notwithstanding this recognition and reservation of the titular sovereignty of Colombia in the proposed treaty, one of the objections which led to its defeat in the Colombian Congress was that Colombia would lose its actual sovereignty in the isthmus and that the real sovereign would be the United States.

But Article IV of the Hay-Pauncefote treaty guards the neutralization of the canal and the other provisions of the treaty from any impairment by a change in the territorial sovereignty of the zone (even if it should subsequently become territory of the United States) in the following terms:

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.¹⁰

It may be interesting and instructive at this juncture, to recall the position and utterances of the Government of the United States when the Monroe Doctrine was still in its youth, in regard to the nature of the proposed undertaking and the desirableness of inducing European governments to join in the guaranty of the neutrality of the isthmus as embodied in the treaty of 1846, either by a similar agreement with Colombia (then New Granada) or directly with the United States.

In December, 1849, Mr. Clayton, Secretary of State, instructed Mr. Foote, United States minister at Bogota, to urge upon the New Granadian Government to take measures to obtain a similar guaranty of neutrality from Great Britain.

The guaranty of Great Britain [said Mr. Clayton] is necessary for the security of the capital to be invested in the railroad and is of great and obvious importance to the United States.

At the same time, Mr. Clayton instructed Mr. Lawrence, United States minister at London, to co-operate with the New Granadian minister at that capital,

in obtaining from the British Government a guaranty of the neutrality of the Isthmus of Panama similar to that contained in Article 35 of the treaty of 1846.

¹⁰ Malloy's *Treaties and Conventions*, Vol. I, p. 783.

Mr. Lawrence was also authorized, in case he ascertained that the British Government would not enter into such a treaty with New Granada, to sound Lord Palmerston as to the disposition of his government to conclude a treaty with the United States for the same purpose.¹¹

Instructions similar to those sent to Mr. Lawrence were also sent by Mr. Clayton to Mr. Rives, our minister at Paris, January 26, 1850, with reference to possible negotiations to this end with the Government of France.

President Polk had said in his message of February 10, 1847, transmitting the treaty of 1846 to the Senate, for the advice and consent of that body, that —

it will [would] constitute no alliance for any political object but for a *purely commercial purpose, in which all the navigating nations of the world have a common interest*;

and he also had made the following observations, which like the remark just cited, are worthy of our remembrance and consideration to-day:

In entering into the mutual guarantees proposed by the 35th article of the treaty, neither the Government of New Granada nor that of the United States has any narrow or exclusive views. The ultimate object, as presented by the Senate of the United States in their resolution [of March 3, 1835] to which I have already referred, is *to secure to all nations the free and equal right of passage over the isthmus*.

If the United States, as the chief of the American nations, should first become a party to this guarantee [of the neutrality of the isthmus], it cannot be doubted, indeed it is confidently expected by the Government of New Granada, that similar guarantees will be given to that republic by Great Britain and France. * * * *The interests of the world at stake are so important* that the security of this passage between the two oceans can not be suffered to depend upon the wars and revolutions which may arise among different nations.¹²

This presidential message is of peculiar interest in connection with the pending discussion of the Panama Canal Act, and the protest of Great Britain against its discriminating provisions; for nations are moral persons and have a continuing personality and responsibility from one generation to another.

¹¹ Moore's *Inter. Law Dig.*, III, p. 10.

¹² Richardson's *Presidents' Messages*, Vol. IV, pp. 511-513.

The guarantee of the sovereignty of New Granada over the isthmus [continued the President] is a natural consequence of the guarantee of its neutrality, and there does not seem to be any other practicable mode of securing the neutrality of this territory. New Granada would not consent to yield up this province in order that it might become a neutral state, and, if she should, it is not sufficiently populous or wealthy to establish and maintain an independent sovereignty. But a civil government must exist there in order to protect the works which shall be constructed. New Granada is a power which will not excite the jealousy of any nation. *If Great Britain, France, or the United States held the sovereignty over the isthmus, other nations might apprehend that in case of war the government would close up the passage against the enemy; but no such fears can ever be entertained in regard to New Granada.*¹³

Thus early it was seen that in the execution of the original plan, the neutrality of the canal involved the innocent passage of ships of war, no matter what nations might be belligerents, as was afterwards and is still the rule in the Suez Canal under the convention of October 29, 1888, between the great Powers.

During the war with Spain, the Department of State was informed by the British Foreign Office, upon an inquiry made by Mr. Hay, that the Suez Canal was open alike to American and Spanish vessels of war. Long prior to this, Lord Granville, in his note of January 7, 1882, to Mr. West, had observed:

The Navy Department of the United States must be well aware that Her Majesty's Government have never sought to bar or even to restrict the use of the canal by the naval forces of other countries, and that even during the recent war between *Russia and Turkey*, when the canal itself *formed a portion of the territory of one of the belligerents*, when the seat of conflict was close at hand, and when British interests might in many other respects have been nearly involved, they contented themselves with obtaining an assurance that the sphere of operations should not be extended to the canal.¹⁴

Some recent writers have contended that it is "unthinkable" that the United States should allow public vessels of a nation with whom it might be at war to pass through the canal, but taken literally, that is just what the "neutralization" provided for in the Hay-Pauncefote

¹³ Richardson's *Presidents' Messages*, Vol. IV, pp. 511-513.

¹⁴ "Clayton-Bulwer Treaty and Monroe Doctrine," Senate Ex. Doc. No. 194, 47th Congress, 1st Session, p. 192.

treaty seems to mean. This appears from the six rules prescribed in Article III, and also from the declaration that these rules are substantially the same as the rules for the neutralization of the Suez Canal. While the Hay-Pauncefote treaty provides that the canal shall never be blockaded and that no right of war shall ever be exercised within it, it also seems to provide for the innocent passage of vessels of war, *flagrante bello*, even if the United States may be one of the belligerents.¹⁵ More will be said on this question later on.

The United States and Great Britain had the same conception of the neutralization of the isthmian canal when the Clayton-Bulwer treaty was negotiated, as evidenced by Article II, and they subsequently discussed the manner in which this common right of passage should be exercised in case they went to war with each other, the discussion ending in the recommendation of the following provision, on the 30th of April, 1852, to their respective governments, by Mr. Webster, who was then Secretary of State, and Mr. Crampton, the British minister at Washington:

Whereas it is stipulated by Article II of the convention between Great Britain and the United States of America, concluded at Washington on the 19th day of April, 1850, that vessels of the United States or Great Britain traversing the said canal shall, *in case of war between the contracting parties*, be exempt from blockade, detention, or capture by either of the belligerents, and that that provision should extend to such a distance from the two ends of the said canal as might thereafter be found expedient to establish; now, for the purpose of establishing such distance within which the vessels of either of said nations shall be exempt from blockade, detention, or capture by either of the belligerents, it is hereby declared that it shall extend to all waters within the distance of twenty-five nautical miles from the termination of said canal on the Pacific and on the Atlantic coasts.¹⁶

The Hay-Pauncefote treaty neutralizes "the waters adjacent to the canal within three marine miles of either end," and also provides that "a vessel of war of one belligerent shall not depart within twenty-four hours of the departure of a vessel of war of the other belligerent." The rules adopted by the United States for the neutralization of the canal

¹⁵ See the rules for the neutralization of the canal printed in the margin, *infra*, p. 37.

¹⁶ Reports of Senate Committee on Foreign Relations, 1789-1901, pp. 639, 640.

and its use by all nations on equal terms are six in number and for convenience of reference are printed in the margin.¹⁷

There were seven of these rules in the Hay-Pauncefote treaty of February 5, 1900. The first rule of the earlier treaty differed from Rule 1 of the treaty now in force in having the words "in time of war as in time of peace" follow the words "the canal shall be free and open," and in not having the words, "observing these rules," after the words "all nations." Nor did it have the words, "Such conditions and charges of

¹⁷ Article III. The United States adopts, *as the basis of the neutralization of such ship canal*, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to *the vessels of commerce and of war of all nations* observing these Rules, on terms of *entire equality*, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the services.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal. — Malloy's *Treaties and Conventions*, Vol. I, pp. 782-783.

traffic shall be just and equitable." But the provisions for the innocent use of the canal by belligerents in time of war are the same in both sets of rules. Rule 7, in the earlier treaty, expressly prohibiting fortifications, is omitted in the treaty now in force, which, however, ordains, Rule 2, that "the canal shall never be blockaded nor shall any right of war be exercised nor any act of hostility be committed within it."

In the Senate resolution which was adopted in 1835, and to which President Polk referred in his message (*supra*, p. 34), President Jackson had been respectfully requested —

to consider the expediency of opening negotiations with the governments of other nations, and particularly with the governments of Central America and New Granada, for the purpose of effectually protecting by suitable treaty negotiations with them such individuals or companies as may [might] undertake to open a communication between the Atlantic and Pacific Oceans, by the construction of a ship canal across the isthmus which connects North and South America, and of securing forever by such stipulations *the free and equal right of navigating such canal to all such nations on the payment of such reasonable tolls as may be established to compensate the capitalists who may engage in such undertaking and complete the work.*¹⁸

By whomsoever the waterway is opened, the world-wide physical and economic effects of joining the Atlantic and Pacific remain the same, and the original understanding and desire of all civilized peoples that this stupendous change should be a work of peace for the general benefit of mankind, should be sacredly respected and made good. In his report, accompanying President Hayes' message on the Wyse concession, Mr. Evarts describes the effect of the construction of the canal as "so stupendous a change from the natural configuration of this hemisphere as transforms the Isthmus of Panama from a barrier, between the Atlantic and Pacific Oceans, into a gateway and thoroughfare between them for the navies and merchant ships of the world." The very idea of the union of the oceans and the neutralization of the connecting waterway involves equality of use and is incompatible with the erection of fortifications and the military occupation of the neutralized zone, unless for the protection of its neutrality in the event that it is seriously threatened — a contingency which neutralization itself, as exemplified

¹⁸ Moore's *Inter. Law Dig.*, III, p. 3.

by the history of the Suez Canal and the countries which have been neutralized, makes most remote and improbable.¹⁹

No people or government has made from the outset clearer declarations or more solemn pledges than the United States for the neutralization and the impartial use of the canal; and those of her citizens who would have her take advantage of her acquisition from Panama of the right to open and equip the waterway at her own cost and who would justify her in seeking to gain some special and peculiar privileges on the ground of expense and ownership, forget that she is a voluntary trustee for mankind, and that until she acquired this right and undertook this task of her own accord, she had always contended that under no circumstances should the enterprise be undertaken or conducted for military purposes or warlike advantage, or with any other end in view but the common, commercial convenience and benefit of the world. Hence it is that in the Hay-Pauncefote treaty, which supersedes the Clayton-Bulwer treaty, the neutralization of the canal, which was declared to be a "general principle" in the former treaty, is declared to be a "general principle" in the latter; and the United States therein and thereby adopts and prescribes substantially the same rules for this neutralization and impartial use of the Panama Canal as those adopted and prescribed in the treaty of October 29, 1888, between the great Powers of Europe for the regulation and conduct of the Suez Canal.

Thus it is, that, although builder and owner of the canal, the United States is not free to use it as she pleases, because before she undertook to build it, she recognized as clearly and insisted as strenuously as Great Britain that the physical change which it would make in the relation and use of the two great oceans of the globe demanded that it should be neutralized and kept free for the common and impartial service of the shipping of the world.

¹⁹ On the question of fortifying the canal, see the following articles which have appeared in this JOURNAL: "Neutralization of the Panama Canal," by Peter C. Hains, Vol. 3, p. 354 (April, 1909); "Fortification at Panama," by George W. Davis, Vol. 3, p. 885 (October, 1909); "The Real Status of the Panama Canal as Regards Neutralization," by H. S. Knapp, Vol. 4, p. 314 (April, 1910); "Fortification of the Panama Canal," by Richard Olney, Vol. 5, p. 298 (April, 1911); "The Right to Fortify the Panama Canal," by Eugene Wambaugh, Vol. 5, p. 615 (July, 1911); "The Canal Fortifications and the Treaty," by Crammond Kennedy, Vol. 5, p. 620 (July, 1911).

As early as 1826, Mr. Clay, who at that time was Secretary of State in the cabinet of Mr. John Quincy Adams, said in his instructions to Messrs. Anderson and Sergeant, the United States delegates to the Pan-American Congress at Panama which had been convoked by Bolivar:

If the work should ever be executed, so as to admit of the passage of sea vessels from ocean to ocean, the benefits of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls.²⁰

Thirty years later, referring to the purpose of the United States in negotiating the Clayton-Bulwer treaty, and to certain incidents prior to its conclusion (April, 1850), President Pierce remarked, in his message of May 15, 1856, to Congress (Mr. Marcy being Secretary of State):

Paramount to that of any European state, as was the interest of the United States in the security and freedom of projected lines of travel across the isthmus by the way of Nicaragua and Honduras, still we did not yield in this respect to any suggestions of territorial aggrandizement, or even of exclusive advantage, either of communication or of commerce. Opportunities had not been wanting to the United States to procure such advantage by peaceful means and with full and free assent of those who alone had any legitimate authority in the matter. We disregarded those opportunities *from consideration alike of domestic and foreign policy, just as, even to the present day, we have persevered in a system of justice and respect for the rights and interests of others as well as our own in regard to each and all of the States of Central America.*²¹

This presidential message was sent to Congress and discussed abroad when the Clayton-Bulwer treaty had been in operation for six years.

The significant fact, that it was the United States that invited Great Britain to enter into the Clayton-Bulwer treaty, was pointed out by the late Senator Cushman K. Davis, when, as Chairman of the Senate Committee on Foreign Relations, he reported the Hay-Pauncefote treaty of 1900, which, after being ratified by the Senate of the United States, was rejected by Great Britain on account of an amendment which had been adopted by the Senate against Senator Morgan's objections, because it seemed to him, as it did to the British Government, to

²⁰ Moore's *Inter. Law Dig.*, Vol. III, p. 2.

²¹ Richardson's *Presidents' Messages*, Vol. V, p. 370.

imperil the complete and permanent neutralization of the canal. This amendment, which was inserted at the end of Section 5 of Article II of the proposed treaty, provided —

that none of the immediately foregoing conditions and stipulations in sections numbered 1, 2, 3, 4 and 5 of this article shall apply to measures which the United States may find it necessary to take for securing, by its own forces, the defense of the United States and the maintenance of public order.

In his report against this amendment, Mr. Morgan said:

Such a reservation is entirely superfluous and unnecessary and carries with it an acknowledgment in favor of Great Britain of a right of control over our national sovereignty that she does not claim and that could not be inferred from the mere silence of the treaty as to such possible right.

The only legal effect of the amendment, if it can have any effect upon our national rights or powers, *is to annul the neutralization of the canal provided for in Article II of the treaty under consideration.*²²

This same provision was moved again, in executive session, as an amendment to Article III of the existing treaty, but was defeated by a vote of 62 to 15 — probably on the ground, which had been indicated by Senator Morgan, that the Suez Canal being in Egypt, under the suzerainty of Turkey, it was proper that the Turkish and Egyptian rights of national defense should be reserved as they were in Article X of the Constantinople convention, whereas the Panama Canal, or any canal on the isthmus, not being an integral part of the United States, although under its control, it would go without saying that the United States could take all necessary measures “for securing by its own forces the defense of the *United States* and the maintenance of public order.”

The undersigned does not admit [said Senator Morgan] the proposition that when we agree that the Nicaraguan Canal shall not be fortified as “a point of invitation for hostilities or a prize for warlike ambition,” we must also provide for the right to defend our own country on the coast of California by express provisions in a treaty with Great Britain removing *objections that may arise* [italics Senator Morgan’s] from the Clayton-Bulwer treaty.^{22a}

²² *Views of the Minority*, signed JOHN T. MORGAN, and reprinted in Reports of Senate Committee on Foreign Relations, 1789–1901, Vol. VIII, pp. 668–670.

^{22a} Senate Document No. 268, 56th Congress, 1st Session, p. 35.

Referring to a proposed treaty with Nicaragua, which had been negotiated in June, 1849, by Mr. Heis, United States *chargé d'affaires* in Guatemala, Mr. Davis made the following observation in his aforesaid report of April 5, 1900, from the Foreign Relations Committee of the United States Senate:

Shortly afterwards Mr. Squire negotiated a treaty of like import with Honduras, which was suppressed by the United States to make way for the Clayton-Bulwer negotiations. Nevertheless, Mr. Clayton held these treaties in the State Department and made use of them *as a means of inducing the British Government to negotiate the Clayton-Bulwer treaty*.²³

Referring to an interview which Mr. Rives, our minister to France, had at London with Lord Palmerston in 1849, and at which he had observed to his lordship, under instructions from Mr. Clayton —

that there was one question, which, unless great prudence and caution were observed on both sides, might involve the two governments, unwittingly, in collision, —

Mr. Davis explained, in this report of his from the Senate Committee on Foreign Relations, that —

That question was the support given by Great Britain to the claim of “ownership and sovereign jurisdiction by the Mosquito Indians of the mouth and lower part of the river San Juan de Nicaragua.”

In that connection, Mr. Davis cited certain representations made to Lord Palmerston by Mr. Rives, under his aforesaid instructions from Mr. Clayton, among which were the following:

The United States sought no exclusive privilege or preferential right *of any kind* in regard to the proposed communication, and their sincere wish, if it should be found practicable, was *to see it dedicated to the common use of all nations, on the most liberal terms and a footing of perfect equality for all*. [Italics in the Senate committee's report.]

That the United States would not, if they could, *obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind*. [Italics in the Senate committee's report.]

That while they aimed at no exclusive privilege for themselves, they could never consent to see so important a communication fall under the exclusive control of any other great commercial power.

²³ Reprinted in Reports of Senate Committee on Foreign Relations, 1789–1901, Vol. VIII, p. 637.

"We thus," said Mr. Davis, speaking for the Foreign Relations Committee of the Senate, in his report of April 5, 1900, "initiated and explained our fixed policy as to a canal through the Isthmus of Darien."

The adhesion of the United States to the principles of neutralization and equality, and its desire not to secure any preferential advantage in the use of an interoceanic canal, were strongly expressed by Mr. Blaine in his instructions to Mr. Lowell, under date of June 24, 1881:

The United States recognizes a proper guarantee of neutrality as essential to the construction and successful operation of any highway across the Isthmus of Panama, and in the last generation every step was taken by this government that is deemed requisite in the premises. The necessity was foreseen and abundantly provided for, long in advance of any possible call for the actual exercise of power. * * * *Nor, in time of peace, does the United States seek to have any exclusive privileges accorded to American ships in respect to precedence or tolls through an interoceanic canal any more than it has sought like privileges for American goods in transit over the Panama Railway, under the exclusive control of an American corporation.* The extent of the privileges of American citizens and ships is measurable under the treaty of 1846 by those of Colombian citizens and ships. *It would be our earnest desire and expectation to see the world's peaceful commerce enjoy the same just, liberal, and rational treatment.*²⁴

In connection with this record and the British protest against the immunity from tolls, granted to our shipping in the coastwise trade by the Panama Canal Act, it should be recalled that an amendment was offered during the debate on the earlier Hay-Pauncefote treaty of 1900, to the effect that —

*the United States reserves the right in the regulation and management of the canal to discriminate in respect of the charges of traffic in favor of vessels of its own citizens engaged in the coastwise trade;*²⁵

and that this proposed amendment was voted down in executive session by 43 to 27, — a vote which made it clear that the phrase "all nations" in the proposed treaty was intended to include the United States.

In view of the fate of the proposed amendments to the earlier treaty, no attempt was made to provide for any discrimination in the Hay-

²⁴ "Clayton-Bulwer Treaty and Monroe Doctrine," Senate Ex. Doc. No. 194, 47th Congress, 1st Session, p. 174.

²⁵ Senate Document, No. 85, 57th Congress, 1st Session, injunction of secrecy removed, p. 16.

Pauncefote treaty, which was concluded in the following year (1901), and is now in force.

There never was any objection to the Clayton-Bulwer treaty by the United States on account of its "general principle of neutrality," or the use of the canal on equal terms by all nations. In his note of 20th October, 1857, when the controversy was at its height, General Cass, who was then Secretary of State, said to Lord Napier, the British minister in Washington:

The United States, as I have before had occasion to assure your lordship, demand no exclusive privileges in these passages, but will always exert their influence *to secure their free and unrestricted benefits, both in peace and war, to the commerce of the world.*²⁶

And again, on the 8th of November, 1858, referring to the spirit and purpose of the Clayton-Bulwer treaty, General Cass said to his lordship:

While the declared object of that convention had reference to the construction of a ship-canal by the way of San Juan and the Lakes of Nicaragua and Managua, from the Atlantic to the Pacific Ocean, *yet it avowed none the less plainly a general principle in reference to all practicable communications across the isthmus, and laid down a distinct policy by which the practical operation of this principle was likely to be kept free from all embarrassment. The principle was that the interoceanic routes should remain under the sovereignty of the states through which they ran, and should be neutral and free to all nations alike.*²⁷

In this same note, and in immediate connection with the preceding citation, General Cass stated the case of the United States against Great Britain as follows:

The policy was that, in order to prevent any government outside of those states from obtaining undue control or influence over those interoceanic transits, no such nation should erect or maintain any fortifications commanding the same, or in the vicinity thereof, or should "occupy, or fortify, or colonize, or assume, or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America." So far as the United States and Great Britain were concerned, those stipulations were expressed in unmistakable terms; and in reference to other nations, it was declared that the "contracting parties in this convention engage to invite every state with which both or either

²⁶ "Clayton-Bulwer Treaty and Monroe Doctrine," Senate Ex. Doc. No. 194, 47th Congress, 1st Session, p. 113.

²⁷ *Ibid*, pp. 137, 138.

have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other."

At that time the United States had no possessions whatever in Central America, and exercised no dominion there. In respect to this government, therefore, the provisions of Article I of the treaty could operate only as a restriction for the future; but Great Britain was in the actual exercise of dominion over nearly the whole eastern coast of that country, and in relation to her, this article had a present as well as a prospective operation. She was to abandon the occupancy which she already had in Central America, and was neither to make acquisitions, or erect fortifications, or exercise dominion there in the future. In other words, she was to place herself in the same position with respect to possessions and dominion in Central America which was to be occupied by the United States, and which both of the contracting parties to the treaty engaged that they would endeavor to induce other nations to occupy.

This was the treaty as it was understood and consented to by the United States, and this is the treaty as it is still understood by this government.²³

This notable state paper closes with a masterly recapitulation of the American side of the controversy with Great Britain over the Clayton-Bulwer treaty and reiterates the adhesion of the United States to the principles of neutralization and equality, as follows:

It is of no small consequence either to the United States or Great Britain that these Central American controversies between the two countries should be forever closed. On some points of them, and, I have been led to hope, *on the general policy which ought to apply to the whole isthmian region, they have reached a common ground of agreement. The neutrality of the interoceanic routes, and their freedom from the superior and controlling influence of any one government;* the principles upon which the Mosquito protectorate may be arranged, with justice alike to the sovereignty of Nicaragua and the Indian tribes; the surrender of the Bay Islands, under certain stipulations for the benefit of trade and the protection of their British occupants; and the definition of the boundaries of British Belize; about all these points there is no apparent disagreement, except as to the conditions which shall be annexed to the Bay Islands' surrender, and as to the limits which shall be fixed to the settlements of Belize. Is it possible that, if approached in a spirit of conciliation and good feeling, these two points of difference are not susceptible of a friendly adjustment? To believe this would be to underestimate the importance of the adjustment, and the intelligent appreciation of this importance which must be entertained by both nations.

²³ "Clayton-Bulwer Treaty and Monroe Doctrine," Senate Ex. Doc. No. 194, 47th Congress, 1st Session, p. 138.

What the United States want in Central America, next to the happiness of its people, is the security and neutrality of the interoceanic routes which lead through it. This is equally the desire of Great Britain, of France, and of the whole commercial world. If the principles and policy of the Clayton-Bulwer treaty are carried into effect, this object is accomplished.

When, therefore, Lord Malmesbury invites new overtures from this government upon the idea that it has rejected the proposal embraced in Sir William Ouseley's mission for an adjustment of the Central American questions by separate treaties with Honduras, Nicaragua, and Guatemala, upon terms substantially according with the general tenor of the American interpretation of the treaty, *I have to reply to his lordship, that this very adjustment is all that the President has ever desired*, and that, instead of having rejected that proposal, he had expressed his cordial acceptance of it, so far as he understood it, and had anticipated from it the most gratifying consequences.²⁹

In his aforesaid report of April 5, 1900, from the Foreign Relations Committee of the United States Senate, Mr. Davis makes the following citation from President Buchanan's message of December 3, 1860, to Congress, after the successful issue of Sir William Ouseley's mission to Central America:

"The discordant constructions of the Clayton and Bulwer treaty between the two governments, which at different periods of the discussion bore a threatening aspect, have resulted in a final settlement entirely satisfactory to this government."

And, speaking for the Senate Committee, Mr. Davis continues:

As no Congress from that day to this has disputed the validity and finality of this settlement, it can scarcely be justifiable now to set up those same "discordant constructions," or the alleged want of good faith in the British Government in executing the treaty, as a reason for declaring that the treaty is in fact abrogated.

The President then proceeds to restate the actual controversies and the manner of their settlement, as follows:

"In my last annual message I informed Congress that the British Government had not then 'completed treaty arrangements with the Republics of Honduras and Nicaragua in pursuance of the understanding between the two governments. It is, nevertheless, confidently expected that this good work will ere long be accomplished.'

"This confident expectation has since been fulfilled. Her Britannic Majesty concluded a treaty with Honduras on the 20th of November,

²⁹ "Clayton-Bulwer Treaty and Monroe Doctrine," Senate Ex. Doc. No. 194, 47th Congress, 1st Session, pp. 145, 146.

1859, and with Nicaragua on the 28th of August, 1860, relinquishing the Mosquito protectorate. Besides, by the former, the Bay Islands were recognized as part of the Republic of Honduras. *It may be observed that the stipulations of these treaties conform in every important particular to the amendments adopted by the Senate of the United States to the treaty concluded at London on the 17th of October, 1856, between the two Governments [the Dallas-Clarendon treaty].*

"It will be recollected that this treaty was rejected by the British Government, because of its objection to the just and important amendment of the Senate to the article relating to Ruatan and other islands in the Bay of Honduras."³⁰

"It is not possible," says the Senate committee, "to ignore a fact or situation so fully and impressively declared by the President in a message to Congress, and acquiesced in by the failure of Congress to signify any dissatisfaction toward *the final settlement so declared, as to the only points of contention that had then arisen under the Clayton-Bulwer treaty.*"

Recurring again to the question whether the rules adopted by the United States, and prescribed in Article III of the Hay-Pauncefote treaty, for the neutralization of the canal [*supra*, footnote¹⁷ p. 37], require that in the event of war between the United States and a foreign Power, the war vessels of the latter should be allowed to pass through the canal on the same conditions as the war vessels of neutrals, it may be observed that the treaty seems to be framed so far as the belligerent rights of the United States in and over the canal are concerned, in case of war with a foreign Power, as though the original plan had been adopted of having the waterway opened through neutralized territory and administered by a neutralized state in accordance with rules adopted by the sovereign parties to the neutralization. The situation, however, in this respect, has been changed by the "perpetual control" acquired over the zone and the construction and administration of the canal by the United States, free from the obligation of inviting other nations to join in guaranteeing the neutrality of the canal. If a canal had been built and the United States and Great Britain had gone to war, while the Clayton-Bulwer treaty was in force, the neutral state administering the canal would have allowed the public vessels of either belligerent to pass through the canal under the rules prescribed by the states guar-

³⁰ Reports of Senate Committee on Foreign Relations, 1789-1901, Vol. VIII, pp. 641, 642.

anteeing its neutrality just as the United States would do, under the existing treaty, in its administration of the canal during a war to which it was not itself a party. But the rules adopted by the United States, in the Hay-Pauncefote treaty, do not seem to have reserved to itself such belligerent rights as the changed conditions might have justified, but to have left it in the position where it would be bound to allow such free passage to ships of war of its enemy as the neutralized state, being the territorial sovereign of the Canal Zone, would have done under the original plan.

Such vessels, if the treaty were construed literally, would simply have to make the transit (Rule 3) "with the least possible delay, without revictualling or taking in any stores during their passage, except so far as might be strictly necessary," and (Rule 4) without disembarking troops or munitions of war or warlike materials in the canal, or (Rule 5) remaining longer than twenty-four hours at any one time, except in case of distress, and no vessel of war of one belligerent could depart within twenty-four hours of the departure of a vessel of war of the other belligerent; all this, however, only in case a public vessel of a belligerent at war with the United States, could get within the three nautical miles of neutralized water at either end of the canal. The Suez Canal treaty expressly prohibits fortifications, as did the proposed Hay-Pauncefote treaty of 1900, while the present Hay-Pauncefote treaty ordains that the canal shall never be blockaded nor any right of war exercised nor any act of hostility committed within it. Nevertheless, it seems clear that the United States has no doubt as to its belligerent right in and over the canal in case it becomes involved in a war with a foreign Power, for instead of leaving the canal open for the passage of the public vessels of "all nations observing these Rules," it is fortifying both ends of the waterway and preparing to garrison the fortifications with its military forces, so that any war vessel of an enemy escaping capture or destruction on the high seas on either side of the isthmus and trying to pass through the canal, would find itself confronted with the forts defending the approach from the Atlantic or Pacific.

The British view of this question may be the same as that of the United States, now that the original plan of the administration of the canal by a neutralized state in neutralized territory, as free as the oceans

it joins, has been abandoned, and the United States at its own expense is opening the transit through the zone, of which, for that purpose, it has acquired "perpetual control and practical sovereignty." This may be indicated by the following excerpt from Sir Edward Grey's note of November 14, 1912, in which he communicates the British protest, to Mr. Bryce:

I notice that in the course of the debate in the Senate on the Panama Canal Bill the argument was used by one of the speakers that the third, fourth, and fifth rules embodied in Article 3 of the treaty show that the words "all nations" cannot include the United States, because, if the United States were at war, it is impossible to believe that it could be intended to be debarred by the treaty from using its own territory for re-victualling its war-ships or landing troops.

The same point may strike others who read nothing but the text of the Hay-Pauncefote treaty itself, and I think it is therefore worth while that I should briefly show that this argument is not well founded.

The Hay-Pauncefote treaty of 1901 aimed at carrying out the principle of the neutralization of the Panama Canal by subjecting it to the same régime as the Suez Canal. Rules 3, 4, and 5 of Article 3 of the treaty are taken almost textually from Articles 4, 5, and 6 of the Suez Canal Convention of 1888. At the date of the signature of the Hay-Pauncefote treaty the territory, on which the Isthmian Canal was to be constructed, did not belong to the United States, consequently there was no need to insert in the draft treaty provisions corresponding to those in Articles 10 and 13 of the Suez Canal Convention, which preserve the sovereign rights of Turkey and of Egypt, and stipulate that Articles 4 and 5 shall not affect the right of Turkey, as the local sovereign, and of Egypt, within the measure of her autonomy, to take such measures as may be necessary for securing the defense of Egypt and the maintenance of public order, and, in the case of Turkey, the defence of her possession on the Red Sea.

Now that the United States has become the practical sovereign of the Canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection.

The United States would doubtless assume that it would be for the "protection" of the canal to prevent its passage by the public vessels of any Power with which she might be at war.

Sir Edward Grey's explanation is in harmony with what Lord Lansdowne said in his memorandum of August 3, 1901, communicated to Mr. Hay during the negotiation of the existing treaty:

I am not prepared to deny that contingencies may arise when not only from a national point of view, but on behalf of the commercial interests

of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures for the defense of the canal at a moment when they were themselves engaged in hostilities.³¹

It may be said that in the Hay-Pauncefote treaty no such provision was necessary as that contained in the convention of Constantinople for securing the defensive rights of Turkey and Egypt, in whose territory the Suez Canal is situated, because no nation at war with the United States would dream of attacking the Panama Canal when the waterway was in actual use "on terms of entire equality" by all the other commercial nations of the world, any more than Russia dreamed of interfering with the Suez Canal when she was at war with the Sublime Porte. The vulnerability of the canal, the ease with which its locks could be put out of commission "by a small party of resolute men armed with a few sticks of dynamite,"³² may also tend to render it immune from flagrant war.

But, however this may be, the United States, having freed itself by the Hay-Pauncefote treaty from certain requirements of the Clayton-Bulwer treaty, including alliances or joint action with foreign governments for the protection and management of the canal, should see to it that the general principles of neutralization and equal terms, expressly preserved, re-affirmed and re-consecrated as they are in the treaty now in force, shall suffer no impairment in the administration of this self-assumed trust for mankind. Thus shall we keep the faith of the treaty and make good the long succession of our declarations and pledges as a nation.

CRAMMOND KENNEDY.

³¹ Moore's *Inter. Law Dig.*, III, p. 215.

³² Senate Document, No. 54, 57th Congress, 1st Session. Report of the Isthmian Canal Commission, 1899-1901, p. 254.